

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

STUYVESANT T. BONNER,

Plaintiff,

V.

CAROLYN W. COLVIN, ACTING  
COMMISSIONER OF THE SOCIAL  
SECURITY ADMINISTRATION,

Defendant.<sup>1/</sup>

Case No. SACV 12-09213 AN

## ORDER

Pursuant to the Court’s Case Management Order, the parties have filed the Administrative Record (“AR”) and a Joint Stipulation (“JS”) raising two disputed issues. The parties have consented to proceed before the Magistrate Judge. The Court has carefully reviewed the parties’ respective contentions in conjunction with the AR. This matter is now ready for decision.

## Issue #1

Plaintiff contends that the Administrative Law Judge (“ALJ”) erred in finding that Plaintiff did not have a severe mental impairment. (JS 4-7, 13.)

The ALJ determined that Plaintiff has non-severe medically determinable mental impairments consisting of adjustment disorder with anxiety and depressed mood due to

<sup>1/</sup> The Acting Commissioner is substituted as the defendant pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. No further action is needed to continue this case by reason of the last sentence of 42 U.S.C. § 405(g).

1 injury (improving), pain disorder due to psychological factors and physical injury,  
2 intermittent insomnia, (mild) due to pain, and polysubstance abuse and depression. (AR  
3 24.) Plaintiff contends that the ALJ's severity finding is erroneous because he did not  
4 articulate legally sufficient reasons for rejecting the opinion of Plaintiff's workers'  
5 compensation treating psychiatrist, Thomas A. Curtis, M.D. (JS 4-7, 13.) Dr. Curtis  
6 initially evaluated Plaintiff in December 2008. (AR 259-63, 399-418.) Plaintiff reported  
7 problems with depression, anxiety, feelings of hopelessness and frustration, diminished  
8 self-esteem, insomnia, social withdrawal, irritability, fatigue, and impaired concentration,  
9 attention, and memory. (AR 259.) Dr. Curtis diagnosed depressive disorder not otherwise  
10 specified with anxiety, and psychological factors affecting a medical condition, including  
11 stress-intensified headache, teeth grinding, hair loss, low back muscle tension/pain,  
12 shortness of breath, palpitations, constipation and possible stress-aggravated high blood  
13 pressure. (AR 263, 408-09.) Dr. Curtis found that Plaintiff works slowly, has decreased  
14 interest and ability in personal grooming and hygiene, is able to attend to daily chores,  
15 engages in limited communication with friends and family, has difficulty with  
16 concentration, memory, and understanding simple written and oral instructions, and is  
17 unable to tolerate the stress of a work environment, attend meetings, adhere to a  
18 schedule, interact effectively with co-workers or make decisions. (AR 261-62.) Dr.  
19 Curtis prescribed four months of weekly cognitive behavioral psychotherapy and stress-  
20 reduction biofeedback, as well as medications for depression, emotional control and  
21 sleep. (AR 263, 413-14.)

22 In an April 2009 follow-up report, Dr. Curtis opined that Plaintiff's psychological  
23 condition was "permanent and stationary." (AR 367.) He found that Plaintiff had  
24 "moderate" impairments in activities of daily living, social functioning, concentration,  
25 persistence and pace, and adaptation (deterioration or decompensation in complex work-  
26 like settings). (AR 385, 387-89.) Plaintiff informed Dr. Curtis that he had not  
27 participated in the prescribed psychotherapy and recommended biofeedback therapy,  
28 claiming that he had not been notified of his appointments. (AR 371.) Dr. Curtis again

1 prescribed four months of weekly psychotherapy and stress-reduction biofeedback  
2 therapy, along with psychotropic medications. (AR 371, 391-92.) Dr. Curtis assigned  
3 Plaintiff a Global Assessment of Function (“GAF”) score of 53, denoting moderate  
4 symptoms or moderate difficulty in social, occupational, or school functioning. (AR  
5 383); *see* American Psychiatric Association, Diagnostic and Statistical Manual of Mental  
6 Disorders, Fourth Edition (“DSM-IV”) Multiaxial Assessment, 27-36 (rev. 2000).

7 In a June 2010 mental impairment questionnaire, Dr. Curtis opined that Plaintiff’s  
8 abilities and aptitude needed to perform unskilled, semi-skilled, and skilled work ranged  
9 from “fair” (defined as seriously limited, but not precluded) to “poor or none” (defined  
10 as no useful ability to function). (AR 263, 408-09, 569, 572-73.) While Plaintiff’s GAF  
11 rating of 53 remained unchanged since his prior evaluation, Dr. Curtis reported that  
12 Plaintiff’s mental impairments resulted in the following functional limitations: marked  
13 restrictions in activities of daily living; moderate difficulties in maintaining social  
14 functioning; frequent deficiencies in concentration, persistence or pace; and repeated  
15 (three or more) episodes of deterioration or decompensation. (AR 573.) Dr. Curtis found  
16 that Plaintiff was unable to work at any job for the foreseeable future. (AR 571.)

17 The ALJ provided specific, legitimate reasons based on the record for rejecting Dr.  
18 Curtis’s opinion. *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1996) (if a treating or  
19 examining physician’s opinion on disability is controverted, it can be rejected only with  
20 specific and legitimate reasons supported by substantial evidence in the record). The ALJ  
21 rejected Dr. Curtis’s June 2010 mental impairment assessment because it conflicted with  
22 his previous findings on examination. (AR 25); *Matney v. Sullivan*, 981 F.2d 1016, 1020  
23 (9th Cir. 1992) (inconsistencies in a physician’s opinion concerning level of disability  
24 represent a specific and legitimate reason for rejecting it); *Weetman v. Sullivan*, 877 F.2d  
25 20, 23 (9th Cir. 1989) (a physician’s opinion may be rejected where it is inconsistent with  
26 the physician’s own treatment notes). Specifically, Dr. Curtis’s June 2010 opinion that  
27 Plaintiff had marked limitations in activities of daily living, frequent deficiencies in  
28 concentration, persistence and pace, and repeated episodes of deterioration or

1 decompensation conflicted with his April 2009 opinion that Plaintiff was moderately  
2 limited in those areas. (AR 387, 573.) There are no treatment records showing a change  
3 in Plaintiff's condition or otherwise justifying the more restrictive functional limitations.  
4 While Dr. Curtis did review additional mental health treatment records from the Veterans  
5 Administration in January 2010, those records predated Plaintiff's alleged onset of  
6 disability by two to three years, and Dr. Curtis expressly stated that those records did not  
7 change his earlier opinion. (AR 22, 505.)

8       The ALJ also discounted Dr. Curtis's April 2009 opinion that Plaintiff had  
9 "moderate" limitations in functioning. (AR 25.) The ALJ found that Plaintiff's failure  
10 to participate in prescribed weekly psychotherapy and biofeedback treatment suggested  
11 that Plaintiff's mental symptoms were adequately controlled with medication. (AR 25,  
12 371); *see Flaten v. Secretary*, 44 F.3d 1456, 1464 (9th Cir. 1995) (explaining that the  
13 ALJ was entitled to draw rational inferences from general lack of treatment in finding  
14 the claimant not disabled); *Warre v. Comm'r*, 439 F.3d 1001, 1006 (9th Cir. 2006)  
15 (explaining that impairments that can be controlled effectively with medication are not  
16 disabling for purposes of determining eligibility for benefits). Plaintiff initially claimed  
17 that he had not been informed of his therapy appointments, however, there is no evidence  
18 that Plaintiff followed through with psychotherapy or biofeedback after these treatments  
19 were prescribed for a second time. (AR 25, 371, 391-92, 643.) Plaintiff asserts that  
20 because Dr. Curtis mentioned "psychotherapy (outpatient) on an as needed basis" in the  
21 June 2010 mental impairment questionnaire, there is record evidence that he participated  
22 in psychotherapy treatment. (JS 7 (citing AR 570).) However, Dr. Curtis's brief reference  
23 to psychotherapy does not establish that Plaintiff ever sought or received the prescribed  
24 treatment. Given Plaintiff's failure to follow through with psychotherapy, the ALJ  
25 reasonably inferred that Plaintiff's mental impairment was not as severe as alleged. (AR  
26 25); *see Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (stating that an ALJ  
27 may reject a treating physician's opinion if it is based to a large extent on a claimant's  
28 complaints that have been properly discounted as incredible).

1       Moreover, in evaluating the severity of Plaintiff's mental impairments, the ALJ  
2 properly relied on the opinions of examining sources. (AR 25-26); *see Tonapetyan v.*  
3 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative examiner's opinion on its own  
4 constituted substantial evidence, because it rested on independent examination of  
5 claimant); *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1989). In March 2009, the  
6 Commissioner's consultative psychiatric examiner, Lou Ellen Sherrill, Ph.D., diagnosed  
7 Plaintiff with alcohol abuse in remission and adjustment disorder with mixed mood. (AR  
8 272.) Dr. Sherrill found that Plaintiff could: perform simple, repetitive tasks with  
9 minimal supervision with appropriate persistence and pace; understand, remember and  
10 carry out at least simple to moderately complex verbal instructions without difficulty;  
11 tolerate ordinary work pressures; interact satisfactorily with co-workers and the public;  
12 and observe basic work and safety standards without difficulty. (AR 272-73.) One year  
13 later, a workers' compensation qualified agreed panel evaluator, psychiatrist James E.  
14 O'Brien, M.D., diagnosed Plaintiff with adjustment disorder with anxiety and depressed  
15 mood due to injury (improving), pain disorder due to psychological factors and physical  
16 injury, intermittent insomnia (mild, due to pain), male hypoactive sexual desire disorder,  
17 and polysubstance abuse and dependence. (AR 637.) Dr. O'Brien gave plaintiff a GAF  
18 score of 67, signifying a mild impairment or mild symptoms. (AR 637.) The opinions of  
19 the examining physicians constitute substantial evidence supporting the ALJ's finding  
20 that Plaintiff's mental impairment was not severe. Any conflict in the properly supported  
21 medical opinion evidence was the sole province of the ALJ to resolve. *Andrews*, 53 F.3d  
22 at 1041.

23       For the foregoing reasons, the ALJ did not err in evaluating the severity of  
24 Plaintiff's mental impairment. Accordingly, reversal is not warranted based on Issue #1.

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**Issue #2**

Plaintiff contends that the ALJ improperly rejected the opinion of Plaintiff's workers' compensation treating orthopedic surgeon, Philip A. Sobol, M.D. (JS 14-16, 18-20.) The Court agrees.

Dr. Sobol conducted an initial orthopedic evaluation of Plaintiff in November 2008. (AR 334-41.) Dr. Sobol diagnosed lumbar spine musculoligamentous sprain/strain with bilateral lower extremity radiculitis, severe stenosis at L3-L4 and moderate stenosis at L2-L3 and L4-L5. (AR 339.) In August 2009, Dr. Sobol issued a permanent and stationary report. (AR 457-70.) In addition to the lumbar spine musculoligamentous sprain/strain diagnosis, Dr. Sobol found that Plaintiff suffered from bilateral upper extremity overuse syndrome, including bilateral wrist/forearm flexor and extensor tendinitis and bilateral carpal tunnel syndrome. (AR 461.) Dr. Sobol concluded that Plaintiff's lumbar spine impairment precluded heavy work activities, which signified that Plaintiff had lost 50 percent of his pre-injury capacity for lifting, bending, stooping, pushing, pulling and climbing. (AR 466.) Dr. Sobol further found that Plaintiff's upper extremity impairments precluded heavy lifting, repetitive flexion and extension of the wrists, repetitive finger dexterity, fine manipulation, and repetitive or forceful pushing, pulling, gripping, grasping, squeezing, holding, and torquing. (AR 468.)

In a June 2010 Residual Functional Capacity ("RFC") questionnaire, Dr. Sobol assessed significantly greater work-related restrictions. (AR 538-44.) He reported that Plaintiff could sit 20 minutes at a time for a total of 2 hours in a workday, stand 15-20 minutes at a time for a total of less than 2 hours in a workday, and lift up to 20 pounds occasionally, has significant limitations in repetitive reaching, handling, fingering and bending, needs to be able to shift positions at will, take unscheduled breaks and walk around every 20 to 30 minutes, and is likely to be absent from work more than three times a month. (AR 541-43.)

The ALJ determined that Plaintiff has severe impairments consisting of spinal stenosis at L3-L4, degenerative disc disease of the lumbar spine and cervical spine, and



1 essential hypertension. (AR 24.) For the period beginning on April 8, 2008, Plaintiff's  
2 alleged onset date of disability, through March 1, 2010, the ALJ found that Dr. Sobol's  
3 opinion that Plaintiff was precluded from heavy work activities (i.e., 50% loss of his pre-  
4 injury capacity of lifting up 50 pounds occasionally) was consistent with Plaintiff's RFC  
5 assessment for light work. (AR 28-29.) However, the ALJ rejected Dr. Sobol's opinion  
6 regarding Plaintiff's carpal tunnel syndrome and assessment of upper extremity  
7 limitations, as unsupported by the medical evidence and inconsistent with the opinion  
8 of the non-examining state agency physician. (AR 29, 342-46.) The ALJ determined that  
9 Plaintiff could frequently push, pull, handle, and finger with his right hand/upper  
10 extremity, and had no limitations with his left upper extremity. (AR 27.) For the period  
11 beginning on March 2, 2010, the ALJ relied on three examining source opinions from  
12 March 2010 to find that Plaintiff has an RFC for medium work.<sup>2/</sup> (AR 26-27, 30-31, 532-  
13 36, 577-85, 647-80.)

14 The ALJ did not offer a sufficiently specific reason for rejecting Dr. Sobol's  
15 assessment of Plaintiff's upper extremity limitations, with respect to the period from  
16 April 8, 2008, through March 1, 2010. Merely stating that Dr. Sobol's opinion was  
17 supported by little medical evidence was not sufficient. *See Embrey v. Bowen*, 849 F.2d  
18 418, 421 (9th Cir. 1988) ("To say that medical opinions are not supported by sufficient  
19 objective findings . . . does not achieve the level of specificity our prior cases have  
20 required."). "The ALJ must do more than offer his conclusions. He must set forth his  
21 own interpretations and explain why they, rather than the doctors', are correct." *Reddick*  
22 *v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998); *Embrey*, 849 F.2d at 421-22. The ALJ here  
23 did not explain what specific objective findings fail to support Dr. Sobol's opinion with

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25 <sup>2/</sup> Although the ALJ stated that Plaintiff could perform the full range of medium work,  
26 he found that Plaintiff was able to "exert 20 to 50 pounds of force occasionally and/or  
27 10 to 20 pounds of force frequently and/or greater than negligible up to 10 pounds of  
28 force constantly to move objects." (AR 30-31.) Medium work, however, requires the  
ability to lift up to "50 pounds at a time with frequent lifting or carrying of objects  
weighing up to 25 pounds." 20 C.F.R. § 404.1520(f). The ALJ did not address the  
inconsistency between his RFC assessment and the regulations definition for medium  
work.

1 respect to Plaintiff's carpal tunnel syndrome and upper extremity limitations. (AR at 29.)  
2 Rather, the ALJ acknowledged that Plaintiff's "severe cervical spine impairment  
3 reasonably explains some of Dr. Sobol's upper extremity limitations," and a June 2009  
4 electromyogram and nerve conduction study was abnormal. (AR 28-29, 555, 560-61.)  
5 The medical record provides support for Dr. Sobol's assessment of upper extremity  
6 limitations. An MRI of Plaintiff's cervical spine from May 2009 revealed multilevel  
7 degenerative changes of the cervical spine and focal central disc protrusions of the C3-4,  
8 C4-5, and C5-6 level. (AR 561.) In addition, a June 2009 electromyogram and nerve  
9 conduction study of Plaintiff's bilateral median motor nerves showed carpal tunnel  
10 syndrome that was slightly worse on the right. (AR 555.) Further, on examination in  
11 August 2009, Dr. Sobol noted tenderness to palpation over the flexor and extensor  
12 tendons and muscles of the wrists and forearms, positive Tinel's sign at the transverse  
13 carpal ligament, positive Phalen's test, and reduced range of motion in flexion and  
14 extension of the wrists, bilaterally. (AR 460.) Thus, the ALJ improperly rejected Dr.  
15 Sobol's opinion on the basis that it was not supported by the medical evidence. *See*  
16 *Embrey*, 849 F.2d at 421-22; *see also* 20 C.F.R. § 404.1527(c) (the proper weight that  
17 an ALJ should give to a treating physician's opinion depends on whether sufficient data  
18 supports the opinion and whether the opinion comports with other evidence in the  
19 record).

20 Further, rejecting Dr. Sobol's opinion simply because it was inconsistent with a  
21 non-examining physician's opinion is not a legitimate and specific reason. (AR 29, 342-  
22 46); *see Embrey*, 849 F.2d at 421 ("We have made it clear that the medical opinions of  
23 a claimant's treating physicians are entitled to special weight and that, if the ALJ chooses  
24 to disregard them, he must set forth specific legitimate reasons for doing so, and this  
25 decision must itself be based on substantial evidence.") While a nonexamining medical  
26 expert's opinion may constitute substantial evidence when it is consistent with other  
27 independent evidence, *Tonapetyan*, 242 F.3d at 1149, the ALJ here failed to point to  
28 such independent evidence. The Commissioner argues that the ALJ properly discounted



1 Dr. Sobol's opinion based on the opinions of three examining sources from March 2010.  
2 (JS 17-18; AR 30-31, 532-36, 577-85, 647-80); *see Tonapetyan*, 242 F.3d at 1149. While  
3 these opinions were supported by independent clinical findings, the ALJ relied on the  
4 examining source opinions to reject Dr. Sobol's opinion only with respect to the period  
5 beginning on March 2, 2010. (AR 31.) Thus, the ALJ failed to give specific, legitimate  
6 reasons, supported by substantial evidence, to discredit Dr. Sobol's assessment of  
7 Plaintiff's upper extremity limitations for the period from April 8, 2008, through March  
8 1, 2010.

9 Accordingly, Plaintiff is entitled to remand for further proceedings on Issue #2.

### 11 ORDER

12 The decision whether to remand for further proceedings or order an immediate  
13 award of benefits is within the district court's discretion. *Harman v. Apfel*, 211 F.3d  
14 1172, 1175-78 (9th Cir. 2000). When no useful purpose would be served by further  
15 administrative proceedings, or where the record has been fully developed, it is  
16 appropriate to exercise this discretion to direct an immediate award of benefits. *Id.* at  
17 1179 ("the decision of whether to remand for further proceedings turns upon the likely  
18 utility of such proceedings"). But when there are outstanding issues that must be  
19 resolved before a determination of disability can be made, and it is not clear from the  
20 record the ALJ would be required to find the claimant disabled if all the evidence were  
21 properly evaluated, remand is appropriate. *Id.*

22 The Court finds a remand is appropriate because there are unresolved issues that,  
23 when properly resolved, may ultimately still lead to a not disabled finding. *See INS v.*  
24 *Ventura*, 537 U.S. 12, 16, 123 S. Ct. 353 (2002) (upon reversal of administrative  
25 determination, "the proper course, except in rare circumstances, is to remand to the  
26 agency for additional investigation or explanation") (internal quotation marks and  
27 citation omitted). Accordingly, the present case is remanded for further proceedings  
28 consistent with this Order.

1 IT IS THEREFORE ORDERED that a judgment be entered reversing the  
2 Commissioner's final decision and remanding the case so the ALJ may make further  
3 findings consistent with this Order.

4  
5  
6 DATED: September 19, 2013

  
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ARTHUR NAKAZATO  
UNITED STATES MAGISTRATE JUDGE